A

ALIAS OTHMAN v. CLEMENT KUA HOCK BENG & ORS

HIGH COURT MALAYA, ALOR SETAR
CHAN JIT LI JC
[CIVIL SUIT NO: 22NCVC-56-08-2016]
2 APRIL 2017

B

CIVIL PROCEDURE: *Striking out – Statement of claim – Application for – Grounds of application – Whether action time barred – Whether witness in court enjoyed immunity from being sued – Whether no cause of action arose – Whether action ought to be struck out*

C

In 2009, the plaintiff sued the first to fourth defendants seeking RM270,000 as general damages and RM200,000 as special damages as compensation for damages suffered resulting from a flood allegedly caused by negligent construction of roads ('2009 action'). At the conclusion of the 2009 action, the High Court gave judgment in favour of the plaintiff. However, the High Court found the plaintiff '50% liable' and had accordingly reduced the amount claimed substantially. The plaintiff, therefore, appealed to the Court of Appeal but his appeal was dismissed. The plaintiff also failed in his attempt to obtain leave to appeal to the Federal Court. Subsequently, the plaintiff instituted the present action premised on the same facts of the 2009 action. The plaintiff contended that the first defendant in the present action, an insurance loss adjuster who was in the employment of the second defendant, an insurance company, was a witness for Takdir Permai (M) Sdn Bhd (the first defendant in the 2009 action) had given fraudulent documentary evidence in the form of photographs tendered as exhibits at the trial in that action that led to the High Court in the 2009 action to substantially reduce the quantum that the plaintiff sought. The defendants in the present action, therefore, sought to strike out the plaintiff's action on the grounds, *inter alia*, that (i) the plaintiff's action was time barred; and (ii) the first defendant, as a witness, enjoyed absolute immunity from being sued.

D

E

F

G

Held (allowing encl. 8 with costs):

(1) Although the plaintiff's claim is connected to events and facts which took place before 2009, his allegation of fraud against the first defendant, on which his present case is founded, was based on an alleged fraudulent testimony of the first defendant that took place during the trial of the 2009 action. Time must therefore run from that date. As the hearing of the 2009 case took place only sometime in 2012, the filing of the present action in 2016 was well within the time frame permissible under s. 29. Therefore, the defendants had failed to show that limitation had set in. (para 15)

H

I

(2) It is a matter of judicial policy that a witness should be allowed to testify freely and fearlessly of a subsequent civil action. This is also meant to prevent multiple actions and double 'punishments' against the errant witness. Even assuming the first defendant had given false evidence or had conspired to give false evidence in the 2009 action, the first defendant enjoyed witness immunity from the instant action; and, therefore, the plaintiff had no cause of action against him. It followed that the claim against the defendants was obviously unsustainable. The claim was frivolous, vexatious and an abuse of the process of court. The application was allowed and the suit against the defendants was dismissed. (para 25)

(3) If indeed the plaintiff's cause of action was founded on 'fraudulent testimony', assuming for the moment that there was such a cause of action called the tort of 'fraudulent testimony', the plaintiff's pleadings ought to show that the first defendant had committed perjury or had conspired to commit perjury that had caused the court at the hearing of the 2009 action to have been misled. The plaintiff's statement of claim was manifestly vague and incoherent. He had not explained coherently in what manner that the first defendant as a witness in the 2009 action had committed perjury or had conspired to commit perjury when giving evidence. This omission offended the fundamental rule that a cause of action must be clearly pleaded. Therefore, the plaintiff in the present action had not established a *prima facie* cause of action. This court held that this defective pleading was an additional ground for a striking out claim and dismissed the action on the grounds of it being frivolous, vexatious and an abuse of the process of court. (para 26)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***
Damport v. Sympson 78 Eng Rep 769 [KB 1596] ***(refd)***
Marrinan v. Vibart [1963] 1 QB 528 ***(refd)***
Palmer v. Durnford Ford (a firm) And Another [1992] 1 QB 483 ***(refd)***
Roy v. Prior [1971] AC 470 ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor (No. 3) [2010] 1 CLJ 429 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 6(1), 29
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

For the plaintiff - in person
For the 1st & 2nd defendants - Robin Lim; M/s Azhar & Wong
For the 3rd defendant - Raj; M/s VK Raj & Bavani

Reported by Sandra Gabriel

A

JUDGMENT

Chan Jit Li JC:

[1] There are three defendants in this action for the tort of 'fraudulently testimony'. Enclosure (8) is an application under O. 18 r. 19(1) of the Rules
B of Court 2012 (ROC) filed by the first and second defendants ('the defendants'). The application is premised on all four limbs, namely, r. 19(1)(a), (b), (c) and (d). Thus, the application will be considered in the light of the statement of claim and all the affidavits filed in respect of the same.

C **[2]** It is trite law that the court should allow a striking out application only in an instance where the plaintiff's claim is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36).

[3] In order to appreciate the defendants' arguments in respect of encl. 8,
D it is necessary to refer to another case, namely, MTAS 21-19-2009 ('the 2009 action'), which had been adjudicated on the merits by the High Court of Malaya at Alor Setar on 12 June 2012. That suit was instituted by the same plaintiff in the instant suit. The defendants in the 2009 case were a company called Takdir Permai (M) Sdn Bhd (Takdir Permai) (the first defendant), the
E 'Jurutera Daerah JKR' ('the JKR District Engineer', the second defendant), the 'Ketua Pengarah JKR Negeri Kedah' ('the Kedah State JKR Director', the third defendant) and 'Kerajaan Malaysia' ('the Government of Malaysia', the fourth defendant).

[4] In the 2009 action, the plaintiff sought compensation for damage to his
F property resulting from flooding caused by Takdir Permai's construction works. The second defendant, the JKR District Engineer, was the supervisor of the project. The third defendant was the second defendant's head of department. The second and third defendants were sued on the basis that they were liable for having awarded the construction project, namely, "Projek
G Membina Jalan Batu Projek 22¼ Jalan Seribu Relong Sg Tengas, Bandar Baru/Kulim Kedah", to Takdir Permai. The fourth defendant, the Government of Malaysia, was sued as being vicariously liable for the liability of the second and third defendants.

[5] In the 2009 action, the plaintiff sued the defendants seeking
H RM270,000 as general damages and RM200,000 as special damages. He alleged that the first defendant, Takdir Permai, was negligent in carrying out the construction of the roads thereby causing the plaintiff's house to be flooded.

I

At the conclusion of the trial in the 2009 action, the High Court gave judgment in favour of the plaintiff. It was in the following terms:

> Dalam Mahkamah Tinggi Malaya di Alor Star
>
> ….
>
> Maka adalah dihakimi bahawa Plaintif dan Defendan Pertama masing-masing bertanggungan 50%-50%
>
> Dan Selanjutnya dihakimi bahawa Defendant Pertama hendaklah membayar kepada Plaintif di atas 100% liability gantirugi am sebanyak RM70,000 sahaja dan juga faedah.
>
> DAN SETERUSNYA DIHAKIMI bahawa tuntutan gantirugi khas Plaintif ditolak. …

[6] The plaintiff was dissatisfied with this judgment as the learned High Court Judge had found him '50% liable' and had accordingly reduced the amount that he had claimed substantially. He, therefore, appealed to the Court of Appeal but his appeal was dismissed.

[7] The plaintiff failed in his attempt to obtain leave to appeal to the Federal Court. Subsequently, he instituted the present action. In the present action, the plaintiff's statement of claim is as follows:

> Penyata Tuntutan
>
> 1. Plaintif ialah Alias Bin Othman, MyKad 452804-07-5029 Beralamat 35 Kampung Seribu Relong Selama, 09800 Serdang Kedah.
> 2. Defendan Pertama ialah Insurance loss adjuster En Clement Kua Hock Beng mykad 721026-13-5027 beralamat Crawford & Company Adjusters (Malaysia) Sdn Bhd (9271-W) 73B Lebuh Raya Darul Aman, 05100 Alor Setar, Kedah Darul Aman.
> 3. Defendan kedua adalah majikan kepada Defendan Pertama iaitu Crawford & Company Adjusters (Malaysia) Sdn Bhd (9271-W) 73B Lebuhraya Darulaman, 05100 Alor Setar, Kedah Darul Aman.
> 4. Defendan Ketiga adalah Uni-Asia General Insurance Suit 3-1, 3-2, 3-3rd floor Menara Penang Garden 42-A Jalan Sultan Ahmad Shah 10050 Penang iaitu syarikat insurance yang mengguna khidmat Defendan Kedua untuk mengurangkan liabilitynya dalam kes Mahkamah Tinggi Alor Setar 21-19-2009.
> 5. Kes Mahkamah Tinggi Alor Star 21-19-2019 ialah berhubung dengan tuntutan Plaintif terhadap Defendan iaitu, kontraktor Takdir Permai yang membina 'Projek Membina Jalan Batu projek 22¼ Jalan Seribu Relong Sg Tengas, Bandar Baharu/Kulim Kedah yang mengakibatkan banjir kepada rumah Plaintif semasa hujan lebat dan Defendan Ketiga adalah insurance kepada kontraktor Takdir Permai di dalam kes 21-19-2009.

A

6. Kes 21-19-2009 Plaintif adalah Alias bin Othman yang juga Plaintif dalam kes di tangan dan Defendan Pertama En Clement Kua Hock Beng adalah saksi SD1 bagi pihak Defendan Takdir Permai yang membina 'Projek Membina Jalan Batu Projek 22 ¼ Jalan Seribu Relong Sg Tengas, Bandar Baharu/Kulim Kedah yang mengakibatkan banjir di rumah Plaintif semasa hujan lebat seperti dalam Penghakiman.

B

7. Akibat daripada bukti gambar di m.s 121 (Rekod Rayuan m/s 382) yang disembunyikan kebenaran yang dikemukakan oleh Pembelaan SD1. Penghakiman menghukum Plaintif dengan kecuaian sertaan RM70,000.00 dikurangkan kepada 50% : 50% dan ganti rugi khas RM256,000.00 ditolak.

C

8. Hukuman di atas dikekalkan oleh Mahkamah Rayuan Kes K-02-2469-11/2012 dan Mahkamah Persekutuan kes P-8(f)-290-/2015 (K) menolak Usul untuk merayu dengan alasan bahawa kekangan kewangan tidak boleh dijadi alasan untuk lanjutan masa untuk merayu.

D

9. Akibat dari pembelaan oleh SD1 telah mendatangkan kerugian kepada Plaintif yang amat ketara hingga Penghakiman menghukum Plaintif dengan kecuaian sertaan RM70,000.00 dikurangkan kepada 50%:50% dan ganti rugi khas RM256,000.00 ditolak atau tidak mendapat pertimbangan Mahkamah.

E

10. Oleh itu SD1 boleh disabitkan dengan kesalahan dibawah Kanun Keseksaan (Akta 574) diantaranya section 418 dan Akta Keterangan S-114 disebabkan Bukti Pembelaan yang tidak benar (fabricated) atau sembunyikan kebenaran.

F

11. Maka dengan itu Plaintif memplidkan ganti rugi seperti yang di tuntutan di Mahkamah Tinggi Alor Setar kes 21-19-2009 less jumlah yang telah dibayar oleh Defendan kes 21-19-2009.

Oleh itu Plaintif dengan rendah diri memohon kepada Mahkamah Yang Mulia ini untuk membenarkan Tuntutan Plaintif ganti rugi khas sebanyak RM258,000.00 ganti rugi am RM70,000.00 faedah 4% less amount yang

G

sudah dibayar dan lain-lain perintah dibuat sebagaimana yang difikirkan patut dan suai menafa'at oleh Mahkamah Yang Mulia Ini.

[8] In the present case, the first defendant (Clement Kua Hock Beng) was an insurance loss adjuster. He was a witness for Takdir Permai in the 2009 action. He was then in the employment of the second defendant (Crawford

H

& Company Adjusters (Malaysia) Sdn Bhd), an insurance company. Although the plaintiff's pleading does not show a clear cause of action against the second defendant, I take it that the plaintiff holds the second defendant vicariously liable on a servant-master relationship.

I

[9] After perusing the submissions by learned counsel for the defendants, I find the following issues required determination:

(i) Is the plaintiff's action time-barred?

(ii) Does a witness enjoy absolute immunity from being sued?

Is The Plaintiff's Action Time-Barred?

[10] In *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69; [1991] 1 MLJ 409, Hashim Yeop Sani CJ (as he then was), in delivering the judgment of the Supreme Court, held:

> The doctrine of limitation is said to be based on two broad considerations. Firstly, there is the presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
>
> The limitation law is promulgated for the primary object, of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation.

[11] Learned counsel for the defendants, relying on s. 6(1) of the Limitation Act 1953, submits that the defence of limitation is open to the defendants as the plaintiff seeks to rely on facts that occurred before 2009; whereas the present action was only filed on 2016. Thus there has been a lapse of more than six years. The plaintiff, on the other hand, contends that his cause of action against the first defendant is one of fraud. The alleged fraud took place when the first defendant testified at the hearing of the 2009 action, and that took place on 11 March 2012. Thus, time should run only from that date. Learned counsel for the plaintiff cites s. 29 of the Limitation Act.

[12] Section 6(1) of the Limitation Act 1953 reads as follows:

> Limitation of actions of contract and tort and certain other action.
>
> 6. (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.
>
> …

[13] However, s. 6 cannot be read in isolation. In cases of fraud, it must be read in conjunction with s. 29 of the Limitation Act which provides as follows:

A Postponement of limitation period in case of fraud or mistake.

29. Where in the case of any action for which a period of limitation is prescribed by this Act, either:

(a) the action is based upon the fraud of the defendant or his agent or any other person through whom he claims or his agent; or

B

(b) ….

(c) ….

The period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with

C reasonable diligence have discovered it.

[14] In the instant case, although the plaintiff's claim is connected to events and facts which took place before 2009, his allegation of fraud against the first defendant, on which his present case is founded, is based on an alleged fraudulent testimony of the first defendant that took place during the trial of

D the 2009 action. Time must therefore run from that date. As the hearing of the 2009 case took place only sometime in 2012, the filing of the present action in 2016, is well within the time frame permissible under s. 29.

[15] It is therefore my judgment that the defendants have failed to show that limitation has set in.

E

Does A Witness Enjoy Absolute Immunity From Being Sued?

[16] There is no dispute that the plaintiff's instant suit against the first defendant is premised on the testimony that the first defendant had given in the 2009 action. According to the plaintiff, the first defendant's evidence at

F the trial in that action was 'fraudulent'. It was because of the first defendant's 'fraudulent' documentary evidence in the form of photographs tendered as exhibits at the trial in that action that led to the High Court in the 2009 action to reduce substantially the quantum that the plaintiff sought. Learned counsel for the defendants, on the other hand, submits that the first defendant, as a

G witness in the 2009 suit, in giving evidence, enjoys immunity from any civil suit. Thus, the plaintiff's claim against the first defendant is obviously unsustainable.

In the present case, the plaintiff appears in person. What I gather from his submission is that the first defendant was a 'fraudulent' witness and the

H defence of witness immunity does not extend to a 'fraudulent' witness. As such, he argues, his claim is sustainable.

[17] The plaintiff's pleading is vague, but it appears to me, however, that by his use of the words 'fraudulent testimony' in essence his complaint is that the first witness at the earlier trial in giving evidence had committed perjury

I (or had conspired to commit perjury) that led to his pecuniary loss.

[18] For the purpose of this present application, I must state that the principle of witness immunity is entrenched in the common law. Historically, the rule that no civil action exists in tort for perjury or conspiracy to commit injury originated in the English common law nearly 400 years ago. In the English case of *Damport v. Sympson* 78 Eng Rep 769 [KB 1596] a plaintiff sought to recover damages against a witness who had testified in an earlier case that involved the misappropriation of a silver fountain. The plaintiff alleged that the witness gave false testimony regarding the fountain value resulting in a judgment of only L200 instead of the fountain's actual value of L500. The plaintiff subsequently obtained a lower court judgment of L300 in damages for the witness perjury. On appeal, however, the Damport Court reversed the plaintiff's judgment for L300 against the witness and held that the plaintiff could not maintain a perjury action for damages against the witness. The Damport Court reasoned that a court might punish a defendant twice, by a civil action for damages and a criminal action for perjury. To avoid punishing a defendant twice, the Damport Court declared that courts should punish perjurers only by criminal actions. The Damport Court also reasoned that a civil action would discourage a witness from testifying in court, and that no precedent existed for a civil action for perjury. Accordingly, the Damport Court dismissed the plaintiff's action.

[19] It is therefore a matter of judicial policy that a witness should be allowed to testify freely and fearlessly without fear of a subsequent civil action. The rule is also meant to prevent multiple actions and double 'punishments' against the errant witness. The rational and extent of the common law principle is reiterated or explained further by the following authorities.

[20] In *Marrinan v. Vibart* [1963] 1 QB 528 Diplock LJ, as he then was, in delivering the judgment of the English Court of Appeal held (at p. 538):

> The rule of public policy is laid down very clearly in the House of Lords in Lord Halsbury L.C.'s speech in *Watson v. M'Ewan* [1905] A.C. 480 'By complete authority, including the authority of this Houses, it has been decided that the privilege of a witness, the immunity from responsibility in an action where evidence has been given by him in a court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable - it is settled law and cannot be doubted.'
>
> Mr Lewis has sought to persuade this court that that rule of public policy, for reasons which it is impossible to explain, applies only to actions for defamation and that, if you are sufficiently ingenious to discover some other way of bringing an action against a witness for evidence which he has given in a court, then the rule of public policy does not apply to that, although all evils of the action are precisely the same as if it were a direct action for defamation. It seems to me quite plain on the authorities - and on the English authorities as well as the Australian authority [*Cabassi v. Vila* 64 C.L.R. 130] as directly in point - that that argument is without foundation.

[21] The reason for witness immunity was succinctly explained by Lord Wilberforce in the House of Lords case of *Roy v. Prior* [1971] AC 470 (at p. 480) as follows:

> The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence should be tried over again. Moreover, the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence.

[22] In the same case, Lord Morris of Borth-Y- Gest held (at p. 477):

> It is well settled that no action will lie against a witness for words spoken in giving evidence in a court **even if the evidence is falsely and maliciously given** (see *Dawkins v. Lord Rokeby* (1873) LR 8 QB 255, *Watson v. M Ewan* [1905] AC 480). If a witness gives false evidence he may be prosecuted if the crime of perjury has been committed but a civil action for damages in respect of the words spoken will not lie (see the judgment of Lord Goddard CJ in *Hargreaves v. Bretherton* [1959] 1 QB 45). Nor is this rule to be circumvented by alleging a conspiracy between witnesses to make false statements (see *Marrinan v. Vibrant* [1963] 1 QB 528).
>
> (emphasis added.)

[23] *Roy v. Prior* was cited with approval in *Palmer v. Durnford Ford (a firm) And Another* [1992] 1 QB 483 where Simon Tuckey QC sitting as a deputy High Court Judge held (at p. 487):

> It is well settled that **witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings**. The reason for this immunity is so that witnesses may give their evidence fearlessly and to avoid a multiplicity of actions in which the truth or value of their evidence would be tried over again: see *Roy v. Prior* [1971] AC 470.
>
> (emphasis added.)

[24] *Palmer v. Durnford Ford* was followed by our Federal Court in *Takako Sakao v. Ng Pek Yuen & Anor (No. 3)* [2010] 1 CLJ 429; [2010] 2 MLJ 141 wherein Gopal Sri Ram FCJ in delivering the decision of the court held (at p. 441 (CLJ); p. 152 (MLJ)):

> Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings; one reason for this immunity is so that a witness may give their evidence fearlessly: see *Palmer v. Durnford Ford (A Firm) And Another* [1992] QB 483 at p. 487].

[25] It is therefore clear that the first defendant, even assuming that he had given false evidence or had conspired to give false evidence in the earlier trial (of the 2009 action), enjoys witness immunity from the instant action; and, therefore, the plaintiff has no cause of action against him. It follows that the claim against the defendants is obviously unsustainable. The claim is frivolous, vexatious and an abuse of the process of court. The application is allowed and the suit against the defendants must be dismissed.

[26] However, for the sake of completeness, I would also like to add that if indeed the plaintiff's cause of action is founded on 'fraudulent testimony', assuming for the moment that there is such a cause of action called the tort of 'fraudulent testimony', his pleadings ought to show that the first defendant had committed perjury or had conspired to commit perjury that had caused the court at the hearing of the 2009 action to have been misled. This the plaintiff has not done so. His statement of claim is manifestly vague and incoherent. He has not explained coherently in what manner that the first defendant as a witness in the 2009 action had committed perjury or had conspired to commit perjury when giving evidence. This omission offends the fundamental rule that a cause of action must be clearly pleaded. Therefore, the plaintiff in the present action has not established a *prima facie* cause of action. Unfortunately, however, this issue was not raised by the defendants. Be that as it may, despite such a failure on the part of the defendants to raise the issue of the absence of a clear cause of action, the interest of justice does not preclude me from holding this defective pleading as an additional ground for striking out claim and dismissing the action on the grounds of it being frivolous, vexatious and an abuse of the process of court.

[27] Having decided so, it renders it unnecessary for me to deal with the remaining issue of *res judicata* (an additional issue that is also raised by the defendants).

[28] The action against the second defendant (allegedly being vicariously liable for the alleged tort of the first defendant) must accordingly be dismissed too.

[29] Enclosure 8 is therefore allowed with costs of RM1,000.